GKM Amal Bhd v Bank Utama (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO 02–225 OF 2000
ALAUDDIN, NIK HASHIM JJCA AND ABDUL WAHAB J
19 JANUARY 2004

Companies & Corporations — Winding Up — Petition — Petition advertised more than seven clear days before hearing date — Breach of r 24 of Companies (Winding Up) Rules 1972 — Whether amounts to irregularity — Companies (Winding Up) Rules 1972 r 194

Pursuant to a summary judgment that was entered against the appellant company, the petitioner (respondent) filed a winding up petition to wind up the appellant company for failure to comply with a notice of demand pursuant to s 218 of the Companies Act 1965. A winding up order was granted to the respondent. The appellant appealed on the ground that there was a breach of r 24 of the Companies (Winding Up) Rules 1972 in that the petition was not advertised seven clear days before the date of the hearing of on 17 September 1999. The petition was instead advertised 22 days before the hearing date. The issue for consideration was whether the breach of r 24 was an irregularity by virtue of r 194 of the Companies (Winding Up) Rules 1972.

Held, dismissing the appeal:

There was no direction by the court under s 221(2) of the Companies Act 1965 to have the petition advertised earlier than seven days and hence the petition was advertised in breach of r 24 of the Companies (Winding Up) Rules 1972. There was however no injustice caused by the breach as the object of giving notice to the creditors had been achieved. The breach was therefore a technicality amounting to a mere irregularity curable under r 194 of the Companies (Winding Up) Rules 1972 (see para 6).

[**Bahasa Malaysia summary**

Mengikut penghakiman terus yang telah dimasukkan terhadap syarikat perayu, pempetisyen (responden) telah memfailkan satu petisyen penggulungan untuk menggulungkan syarikat perayu untuk kegagalan mematuh satu notis tuntutan mengikut s 218 Akta Syarikat 1965. Satu perintah penggulungan telah diberi kepada responden. Perayu merayu di atas alasan bahawa terdapat pelanggaran kaedah 24 Keadah-Kaedah (Penggulungan) Syarikat 1972 kerana petisyen itu tidak diiklankan tujuh hari sebelum tarikh pendengaran pada 17 September 1999. Petisyen itu telah diiklankan 22 hari sebelum tarikh pendengaran. Isu untuk dipertimbangkan di sini adalah sama ada pelanggaran k 24 adalah satu luar aturan melalui k 194 Kaedah-Kaedah (Penggulungan) Syarikat 1972.

Diputuskan, menolak rayuan itu:

Tiada arahan daripada mahkamah di bawah s 221(2) Akta Syarikat 1965 untuk mengiklankan petisyen itu sebelum tujuh hari itu dan oleh itu

petisyen telah telah diiklankan melanggar k 24 Kaedah-Kaedah (Penggulungan) Syarikat 1972. Tidak terdapat ketidakadilan yang disebabkan oleh pelanggaran kerana tujuan memberi notis kepada penghutang telah dicapai. Pelanggaran itu hanya adalah luar aturan yang boleh dibetulkan di bawah k 194 Kaedah-Kaedah (Penggulungan) Syarikat 1972 (lihat perenggan 6).]

Notes

For cases on winding up petitions, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152-1219.
For winding up, see 6 *Halsbury's Laws of Malaysia* paras [110.010]–[110.065]

Cases referred to

Bank Utama (M) Bhd v GKM Amal Bhd [2000] 5 MLJ 657 (refd)
NKM Holdings Sdn Bhd, Re [1985] 2 MLJ 390 (refd)
NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39 (refd)

Legislation referred to

Companies Act 1965 ss 218, 221(2)
Companies (Winding Up) Rules 1972 rr 24, 194(1), Form 4

Ong Chee Keong (Ong Manickam & Co) for the appellant.
Lim Siew Ming (Raja Darryl & Loh) for the respondent.

Nik Hashim JCA (delivering judgment of the court):

[1] The facts are that on 16 October 1998, the High Court of Kuala Lumpur recorded a summary judgment against the appellant company vide Kuala Lumpur High Court Civil Suit No D6–22–1187 of 1998. Pursuant to the aforesaid summary judgment, the petitioner (the respondent before us) filed a winding up petition No D2–28–553 of 1999 to wind up the appellant company for failure to comply with a notice of demand pursuant to s 218 of the Companies Act 1965 ('the Act'). An order for winding up was granted to the respondent dated 25 February 2000 and the appellant company, being dissatisfied with the aforesaid order, appealed to this court.

[2] In this case, the petition was not advertised seven clear days before the date of hearing on 17 September 1999. The petition was advertised in the newspapers, the *Malay Mail* and the *Star* on 26 August 1999 and 27 August 1999, ie 22 days before the hearing date. The appellant contended that by r 24 of the Companies (Winding Up) Rules 1972 ('the Rules') which states that 'every petition shall be advertised in Form 4 seven clear days or such longer time as the court may direct before the hearing', the petition ought to be advertised on 10 September 1999, and since the respondent did not obtain the leave of the court to advertise the petition earlier than the time stipulated, the respondent was in breach of r 24 and therefore the petition, being invalid, ought to be cancelled.

[3] In his judgment, which was reported in *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657 at p 659, Abdul Aziz J (as he then was) held:

> In this case the advertising was, without court direction, done earlier than the seven days. Technically, therefore, it is an irregularity. Since, however, it does not do injustice to anybody and is, on the contrary, beneficial to creditors, I rule that it is an irregularity which, by virtue of r 194, does not invalidate the advertisement.

[4] The issue was whether the breach was an irregularity under r 194 of the Rules.

[5] In *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390, a winding up petition was filed by creditors against the company and the hearing was fixed for 12 December 1983. The *Gazette* of 24 November 1983 was put into circulation on 12 December 1983. A preliminary objection was raised on behalf of the company that the petition has not been advertised in the Government *Gazette* at least seven clear days to the notice. George J (as he then was), in exercising the powers under s 221(2) of the Act, directed that a new date for hearing be fixed and dispensed with the need to advertise the new hearing date whether in newspapers or the gazette. On appeal, the Supreme Court (*NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39) ruled that the learned judge had properly exercised his discretion in dispensing with the advertisement, and dismissed the appeal.

[6] In the present case, however, there was no direction by the court under s 221(2) of the Act to have the advertisement done earlier than the seven days, and hence the petition was advertised in breach of r 24. Nevertheless, we agreed with the views of the learned judge. There was no injustice caused by the breach. The breach was a technicality amounting to a mere irregularity curable under r 194(1) which states:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

[7] Therefore, we held that the petition was not rendered invalid by reason of the irregularity.

[8] The whole purpose of advertisement is to give notice of a winding up petition of a company to the creditors. As the petition in this case was advertised more than the stipulated period of seven days, and that the advertisement was already effected, the object of giving notice to the creditors had been achieved. The appellant cannot be said to be prejudiced by the advertisement. Thus, we found that the learned judge was right in his decision.

[9] That being the case, we dismissed the appeal with costs and ordered the deposit be paid out to the respondent to account of its taxed costs.

Appeal dismissed.

Reported by Mariette Peters-Goh